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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/618,755	07/15/2003	Lee W. Johnston	53394.000712	6941

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EXAMINER

CHAPMAN, GINGER T

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 11/01/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/618,755

Applicant(s)

JOHNSTON ET AL.

Examiner

Ginger T. Chapman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 August 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-49 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-49 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 15 July 2003 is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-14, 16-28, 30-32, 34-46 and 48-49 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Chmielewski (WO 99/49826).

Claims 1 and 30: Chmielewski discloses an absorbent article (10) comprising: a topsheet (30); a backsheet (32);, an absorbent core (342) disposed between the topsheet (30) and the backsheet (32).

With respect to a thermal resistance (clo) of less than about 1.7 watts/m m², as measured in a Thermolabo apparatus, Chmielewski does not perform the claimed test on the absorbent structure and therefore does not disclose results for these tests. The absorbent structure of Chmielewski comprises the same structure and materials disclosed in the instant specification as being a suitable embodiment of the instant invention. Therefore the claimed test results are inherent to the material, and the absorbent structure of Chmielewski fulfills all limitations of the claim. When the structure of the composition recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions are presumed to be inherent (MPEP § 2112-2112.01). A prima facie case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim, (in this case, an absorbent article comprising a topsheet, a backsheet, an absorbent core disposed between the

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topsheet and the backsheet) except for a property or function (in the present case, a thermal resistance (clo) of less than about 1.7 watts/m²) and the examiner reasonably believes that the reference inherently possesses properties that anticipate or render obvious the claimed invention and thus has a basis for shifting the burden of proof to applicant, as per *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

Claim 2: Chmielewski discloses the topsheet (30) and the backsheet (32) form a first waist region (22), a second waist region (24) longitudinally opposite the first waist region, and a crotch region (26) there between, and the absorbent article further comprises at least one fastening element (40) attached to a lateral edge of the first waist region; and one or more target devices attached to the article in the second waist region, where at least one fastening element and the one or more target devices are capable of attaching to one another, the one or more target devices being located so that the first waist region and second waist region of the garment may be joined to one another to secure the garment on a wearer (page 20, lines 5-7 and lines 10-11).

Claim 3: Chmielewski discloses the elastic leg gathers (36) comprising one or more elastic materials disposed adjacent a lateral edge of the crotch region (page 19, lines 19-20), and standing leg gathers (501, 502) disposed on the topsheet adjacent a lateral edge of the crotch region (page 46, lines 19-21).

Claim 4: Chmielewski discloses the at least one fastening element comprises a hook portion of a hook and loop fastener and the one or more target devices comprise the loop portion of a hook and loop fastener (page 20, line 6 (401) and page 15, line 24-25).

Claim 5: Chmielewski discloses at least one fastening element is an adhesive tape (page 15, line 24) and the one or more target devices comprise a tape receiving surface.

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Claim 6: Chmielewski discloses at least one fastening element is comprised of a pair of laterally extending tabs (page 20, line 6) disposed on the lateral edges of the first waist region, whereby the laterally extending tabs each include at least one fastening element.

Claim 7: Chmielewski discloses a fluid acquisition layer (fig. 6: (650); page 26, line 5-6) disposed between the topsheet and the backsheet.

Examiner notes that WO99/49826 page 23 lines 4-5 identify figure 6 (650) as a low density acquisition layer while page 23, line 14 identifies fig. 6 (650) as an optional transfer layer comprising layers 652 and 654. Examiner is interpreting (650) as an acquisition layer in light of p. 23 of WO99/49826, layer 652 as the absorbent layer in light of p. 26 line 9 and layer 654 as the wicking layer in light of p. 23 lines 14-18 and p. 26 lines 8-12.

Claim 8: Chmielewski discloses a distribution layer (page 11, lines 29-31 to p. 12, lines 1-2 and p. 25, lines 21-31: fig. 5b (342e)) disposed between the topsheet and the backsheet.

Claim 9: Chmielewski discloses a wicking layer (654) disposed between the topsheet and the backsheet. See claim 7, *supra*.

Claim 10: Chmielewski discloses a storage layer (p. 11, lines 21-22; p. 20, line 24: (342a)) disposed between the topsheet and the backsheet.

Claim 11: Chmielewski discloses a fragmented layer (page 23, lines 20-23) disposed between the topsheet and the backsheet. Examiner has interpreted “fragmented layer” in light of applicant specification: page 34 lines 19-22 describes fragment layer as fragments of other layers and p. 42 line 7 suggests fragmenting layers using guidelines provided therein. A thorough reading of applicant specification fails to reveal specific guidelines or further teachings of

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fragmenting the layer. In light of the physical description, examiner has interpreted fragmented layer as a layer having different combinations of materials.

Claim 12: Chmielewski discloses a combination of a wicking layer and a distribution layer (page 28, lines 29-31 to p. 29, lines 1-13; figs. 12a-12c) disposed between the topsheet and the backsheet.

Claims 12 and 31: Chmielewski discloses the absorbent core comprises: an upper layer (fig. 2: 342b); a lower layer (342c); and a central fibrous layer (342a) disposed between the upper layer and the lower layer, the central fibrous layer comprising a mixture of at least a fibrous material and superabsorbent polymer (SAP) (page 22, lines 13-16).

Claims 14 and 32: Chmielewski discloses the absorbent core has a density within the range of from about 0.05 to about 0.45 g/cm³ (page 6, lines 2-3).

Claims 16 and 34: wherein the SAP is selected from the group consisting of a water swellable polymer of water soluble acrylic or vinyl monomers crosslinked with a polyfunctional reactant, a starch modified polyacrylic acid, a hydrolyzed polyacrylonitrile, alkali metal salts of hydrolyzed polyacrylonitrile, and mixtures thereof (page 1, lines 21-27).

Claims 17 and 35: Chmielewski discloses the SAP is a starch grafted polyacrylate sodium salt (page 1, lines 26-28).

Claim 18 and 36: Chmielewski discloses the fibrous material is selected from the group consisting of a crimped tow of cellulose acetate or polyester, a low-density roll good, a carded web, and mixtures or combinations thereof (page 35, lines 16-20).

Claim 19 and 37: Chmielewski discloses the absorbent core further comprises from about 1-5% of a thermally bondable fiber (page 29, lines 27-28).

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Claim 20 and 38: Chmielewski discloses the fibrous material is a crimped tow of cellulose acetate (page 35, line 17).

Claim 21 and 39: Chmielewski discloses the central fibrous layer comprises from about 50% to about 95% by weight super absorbent polymer (SAP), and has a SAP efficiency of at least 80% (page 9, lines 4-10).

Claim 22 and 40: Chmielewski discloses the central fibrous layer further comprises particulate additives (page 13, line 25).

Claim 23 and 41: Chmielewski discloses the particulate additives comprise insoluble, hydrophilic polymers having particle diameters of 100 μm or less (page 14, line 3).

Claim 24 and 42: Chmielewski discloses the particulate additives are selected from the group consisting of potato, corn, wheat, and rice starches, and partially cooked or modified starches (page 14, lines 8-9).

Claims 25-28 and 43-46: With respect to intrinsic thermal resistance values, i.e., “ R_{cf} values less of than about 0.25 degrees C m^2/Watts as measured on a 20x20 inch sample in a Thermolabo apparatus” and “less than about 0.17 degrees C m^2/Watts as measured on a 20x20 inch sample in a Thermolabo apparatus” and thermal resistance values, i.e., “ clo values of less than bout 1.65 watts/ m^2 ” and “less than about 1.40 watts/ m^2 ”, Chmielewski does not perform the claimed tests on the absorbent structure and therefore does not disclose results for these tests. The absorbent structure of Chmielewski comprises the same structure and materials disclosed in the instant specification as being a suitable embodiment of the instant invention. Therefore the claimed test results are inherent to the material, and the absorbent structure of Chmielewski fulfills all limitations of the claim.

When the structure of the composition recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions are presumed to be inherent (MPEP § 2112-2112.01). A prima facie case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim, (in this case, an absorbent article comprising a topsheet, a backsheet, an absorbent core disposed between the topsheet and the backsheet) except for a property or function (in the present case, intrinsic thermal resistance and thermal resistance values, Rcf and clo) and the examiner reasonably believes that the reference inherently possesses properties that anticipate or render obvious the claimed invention and thus has a basis for shifting the burden of proof to applicant, as per *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

Claims 29 and 47: Chmielewski discloses the absorbent core has a thickness within the range of from about 5 to about 20 mm (fig. 7b).

Claim 48: Chmielewski discloses folding the absorbent core prior to disposing the core between the topsheet and the backsheet (page 10, lines 11-14).

Claim 49: Chmielewski discloses the absorbent core is folded into a "C" configuration (figs. 1-3, page 24, line 18).

Claims 15 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmielewski (WO 99/49826) in view of Jackson (US 5,350,37).

Claims 15 and 33: Chmielewski discloses an absorbent article comprising a topsheet, a backsheet and an absorbent core disposed between the topsheet and the backsheet. Chmielewski does not disclose the absorbent core having a basis weight within the range of from about 650 to

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about 1350 gsm. Jackson at column 7, lines 36-38, teaches the ability of the absorbent core basis weight to be tailored to an end use and thus expresses the motivation to tailor the absorbent core basis weight to an intended use. Jackson teaches an absorbent core having a basis weight from 100-1000 gsm (col. 2, lines 63-64). In view of this known teaching, to form the absorbent core of Chmielewski having the basis weights as taught by Jackson would have been obvious to one of ordinary skill in the art at the time the invention was made since the provision of size adjustability involves only routine skill in the art.

Claims 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Chmielewski (WO 99/49826) as applied to claim 1 above, and further in view of U.S. Patent No. 6,238,379 issued to Kuehn, Jr et al.

With regard to claim 4, Chmielewski ('826) teaches a fastening system (40) utilizing tape or other suitable mechanical fasteners. Chmielewski is silent as to employing hook and loop fasteners to secure the article about the waist of the wearer. It is well known in the diaper art that mechanical type fasteners include, inter alia, hooks and loops, tapes, adhesives, cohesives, safety pins, buttons and snaps. Kuehn et al disclose the use of mechanical fastening means. In particular, Kuehn teaches that it is generally known in the art to employ hook and loop fasteners to secure a diaper on the wearer (col. 9, lines 46-50) because hook and loop type fasteners are capable of being released and reattached. Therefore, to have utilized the hook and loop type mechanical fastener as taught by Kuehn in the Chmielewski mechanical fastening system to produce a diaper that can be adjusted or checked for soiling without compromising the ability to reuse the fastener would have been obvious to one of ordinary skill in the art at the time the invention was made.

Response to Arguments

Claim Objections

The objection to claim 33 is withdrawn.

Applicant's arguments filed 8 august 2005 have been fully considered but they are not persuasive.

I. Applicant submits that Chmielewski does not disclose the thermal resistance of the article thus Chmielewski fails to disclose every element of the instant claimed invention (remarks, ¶ bridging p. 9 to p. 10) and Chmielewski can only anticipate the claimed invention if the claimed clo and Rcf are inherently disclosed by Chmielewski (remarks, p. 11, ¶ 2).

This argument is not persuasive because the Chmielewski article seems to be identical to the claimed article except that Chmielewski is silent as to the inherent characteristic of thermal resistance. The discovery of a previously unappreciated property of a prior art article does not render the article patentably new. Thus the claiming of a new function or unknown property which is inherently present in the Chmielewski article does not necessarily make the instant claims patentable. *In re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977).

Applicants have not presented a valid side-by-side comparison between the claimed article and that disclosed by Chmielewski, wherein the only difference is the claimed thermal resistance property. The above rejections are made in the sense of *In re Fitzgerald*, thus the burden to show that the prior art article having the same composition and structure does not

possess the claimed property is shifted to Applicants as per *In re Fitzgerald*, 205 USPQ 594 (CAFC).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ginger T. Chapman whose telephone number is (571) 272-4934. The examiner can normally be reached on Monday through Friday 8:30 a.m. to 5:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Ginger Chapman
Examiner, Art Unit 3761
10/24/05



TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER

